

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
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3 RIO TINTO PLC,

4 Plaintiff,

5 v.

14 CV 3042 (RMB-AJP)

6 VALE, S.A.,

7 Defendants.  
8

9 -----x

New York, N.Y.

July 28, 2015

2:10 p.m.

10 Before:

HON. ANDREW J. PECK,

Magistrate Judge

11 APPEARANCES

12 QUINN EMANUEL URQUHART & SULLIVAN, LLP

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14 BY: KEITH H. FORST

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25 BY: PAUL E. SUMMIT

1 (In open court)

2 THE COURT: I'm going to use the July 24 joint status  
3 letter.

4 With respect to the first item, the auditor  
5 information, I'm going to deny the request at this point,  
6 without prejudice to Vale renewing it after it sees the full  
7 extent of the July 30th production, the balance of Rio Tinto's  
8 production, to see if you get from Rio Tinto the sort of  
9 material that you think was exchanged between Rio Tinto and its  
10 auditors.

11 I know that is different than what you agreed to do,  
12 but since you agreed to do it, you're still stuck doing it, Mr.  
13 Liman, but that doesn't necessarily get a quid pro quo.

14 MR. LIMAN: Just a clarification for the record, our  
15 document requests are not limited to what was exchanged between  
16 Rio Tinto and its auditors, but we understand your Honor's  
17 order. I just wanted to clarify that for the record.

18 THE COURT: Next, the redaction with respect to the  
19 later Rio Tinto investigation, any chance you brought a copy of  
20 the material?

21 MR. LIMAN: Yes, your Honor.

22 THE COURT: Hand it up, although I'm probably going to  
23 need the unredacted copy from Rio Tinto to be able to make any  
24 sense out of it.

25 MR. LYTTLE: We have that, your Honor, as well.

1 THE COURT: Good.

2 MR. LIMAN: Your Honor, I should add that with respect  
3 to the, quote/unquote, legal investigation, when we were last  
4 before your Honor on this issue in December, you ordered, let's  
5 see the privileged log, after we see the privileged log, try to  
6 work it out, make your motions. I think that applies to the  
7 legal investigation. There are a number of documents that  
8 don't pertain to the legal investigation that I have handed up.

9 THE COURT: I'm not sure what you're saying, but I  
10 don't need to resolve this?

11 MR. LIMAN: What I'm saying is that for the documents  
12 I handed up, I think you do need to resolve them. There is one  
13 document that I handed up that is with Aeneas and I think it is  
14 also with outside counsel, with Mr. Lytlle, Mr. Lyle. I think  
15 that document you don't yet need to resolve. That will be the  
16 subject of further briefing, further motion practice. The  
17 remainder of the documents do not pertain to Aeneas and you do  
18 need to resolve.

19 MR. LYTTLE: I'm just a little confused. The Aeneas  
20 document and communications with --

21 THE COURT: You're not the only one, so let's do it  
22 this way: Give me the documents. These seem to be starting  
23 with Rio Tinto Bates Number RT 0676855 through 57, and then  
24 76988 through 90, 91 through it looks like 97 or 98 and beyond.  
25 So, hopefully, you have the unredacted set that matches the

1 redacted set that Mr. Liman gave me.

2 MR. LYTTLE: May I make a suggestion? May I see what  
3 Mr. Liman showed you so I can match them up and make it easier?

4 THE COURT: That makes perfect sense.

5 MR. LIMAN: Why don't I put them in date order, also,  
6 and I will exclude the ones which I think you don't need to  
7 resolve.

8 THE COURT: Why don't the two of you work on that.

9 MR. LYTTLE: Just so the record is clear, these  
10 additional documents were not ones they raised with us prior to  
11 the joint letter. So we reviewed these after. They may  
12 require explanation. I point out that we didn't address these  
13 in the joint letter because we didn't know they intended to  
14 raise them. The only one we are aware of is Mr. Toure, which  
15 apparently now we're not dealing with today, and Mr. Aeneas.

16 THE COURT: Okay. You all want to put a pin in this,  
17 and I will deal with the other issues and come back to this  
18 since I'm not sure that you all can walk and chew gum or, in  
19 less facetious terms, talk and also put documents in order,  
20 give it to one of your minions. Remind me to come back to  
21 this.

22 With respect to the attorneys' eyes only  
23 designation -- I'm now at the bottom of page 6 through  
24 page 8 -- it seems to me the burden is on Rio Tinto here. So  
25 my question is: What do you want to do to fix this at this

1 point?

2 MS. McCaffrey: Your Honor, as a personal matter, I do  
3 think we have pretty much resolved this. We sent revised  
4 confidentiality designations with metadata overlays. To the  
5 extent that that does not adequately address Vale's concerns,  
6 we're happy to receive a list of documents from them. We can  
7 go back and look at it.

8 THE COURT: That's what I'm telling you we're not  
9 doing.

10 MS. McCaffrey: I guess my only point, your Honor, is  
11 there are processes in place. We do have a protective order in  
12 place entered by the Court that requires the opposing party, to  
13 the extent that there is a challenge to a confidentiality  
14 designation, to notify us of that, to then conduct a  
15 meet-and-confer. There may be -- I can't say it is perfect.  
16 There may be problems.

17 THE COURT: I understand, and I do understand that the  
18 good ol' day procedures that worked fine don't work nearly as  
19 well when there are 150,000 documents. The fact that as of at  
20 least two days ago -- because of the weekend, four days ago --  
21 when this letter came in, there were still 49,000 documents --

22 MS. McCaffrey: That's not correct, your Honor.  
23 That's incorrect. We have approximately the same percentage of  
24 documents designated as AEO as Vale does. The amount of  
25 documents that we had, I agree, when it first came in, we had a

1 mess-up on our part. That's been corrected. The attorneys'  
2 eyes only designation for that production, we have reduced the  
3 designations down from over 34,000 of our documents. So at  
4 this point there is a subset.

5 THE COURT: It is now 34,000?

6 MS. McCaffrey: No, your Honor, it is less than that.  
7 In terms of our entire production, we have 117,000 documents  
8 that we have produced in this matter. This is a small portion  
9 of those materials.

10 MR. LIMAN: Your Honor, the number 14,000 in the  
11 footnote to our letter indicates even a brief review reflects  
12 that it includes tons of things like newspaper articles and the  
13 like, which either nobody looked at these documents or whoever  
14 looked at these documents had no idea what they were doing.

15 MS. McCaffrey: That's incorrect, your Honor. We have  
16 certainly had attorneys review these materials, and I don't  
17 appreciate -- we corrected that.

18 THE COURT: You have two choices. You're all going to  
19 follow the protocol a few steps, but despite the bulk of the  
20 documents, you know, it is one thing to say almost everything  
21 is confidential because other than when you have to file it  
22 with the Court should this case ever get to a factual  
23 determination whether on summary judgment or trial, it does  
24 matter. The fact that it is attorneys' eyes only, which keeps  
25 Vale and other defendants from showing it to their clients,

1 bothers me; and at some point, I will give you one more shot at  
2 it, but I don't think that you can put the burden on Vale to  
3 say, we over designated, we've now fixed it a lot, but, you  
4 know, whether the number is 14,000 or whatever it is should not  
5 be on them to review them one by one.

6 I'm going to let you all work this out, but the burden  
7 remains on the designator, in this case, Rio Tinto. The issue  
8 may come back to haunt Vale later, it may not. So if you live  
9 by the sword, you die by the sword later.

10 MS. McCAFFREY: Your Honor --

11 THE COURT: Let me just finish.

12 If after another round with some cooperation but not  
13 switching the burden it comes back to me and there are more  
14 than a handful of so clearly misdesignated documents -- and I  
15 have lived through tender-offer litigation where blank  
16 pages were marked either confidential or attorneys' eyes only,  
17 I know these things happen when there is a massive production  
18 and not enough time -- but I'm not shifting the burden to Vale.  
19 And if I find there is abuse -- and this will go to any other  
20 party producing documents later -- after one to two efforts to  
21 fix it, after that, the baby goes with the bath water, and  
22 there will be no attorneys' eyes only designations for  
23 Rio Tinto.

24 Got it? So make another review. Do what you've got  
25 to do within economic reasonableness, work with Mr. Liman and

1 his colleagues, but don't say that if they don't call it to  
2 your attention you don't have to re-review it. If the issue  
3 comes back, I'm going to expect, I guess, Vale to bring samples  
4 of documents still classified incorrectly in their view, and if  
5 there are more than a few, that's the end of it.

6 MS. McCAFFREY: Understood, your Honor. I just want  
7 to make sure it is reciprocal here, because the amount that we  
8 designated is similar to the amount that Vale has designated.

9 THE COURT: It will be reciprocal. Look, something  
10 that is a close call, is this really business sensitive, so it  
11 is clearly confidential, is it attorneys' eyes only, that's one  
12 thing. When I hear that newspaper articles and the like are  
13 designated as attorneys' eyes only, there's something wrong  
14 with the process.

15 MS. McCAFFREY: Yes, your Honor. Completely  
16 understood. I will note that some of these materials are  
17 investigator materials. That may be also where some of the  
18 confusion is.

19 THE COURT: The investigator's material is public  
20 record. It is not attorneys' eyes only just because an  
21 investigator wrote about it.

22 MS. McCAFFREY: Understood. Thank you, your Honor.

23 THE COURT: Next issue, update on the investigators.  
24 I see that my counterpart in the UK has given you certain  
25 rulings, and I don't think there is anything that you're asking



1 me to do in connection with that.

2 MR. LIMAN: Your Honor, not at this moment. We would  
3 note the finding with respect to document destruction --

4 THE COURT: I did read that.

5 MR. LYTTLE: Your Honor, may I address that briefly?

6 THE COURT: That depends. Are you asking me to rule  
7 on it?

8 MR. LYTTLE: I'm not.

9 THE COURT: Then, why do I want to listen to something  
10 that I may or may not remember when the issue comes up again if  
11 it comes up again?

12 MR. LYTTLE: That's fine, your Honor. There is one  
13 point I would like to add.

14 THE COURT: Go ahead.

15 MR. LYTTLE: There was an additional witness statement  
16 that was served by Vale's counsel which we believe  
17 mischaracterizes some of the facts in the record, as well as to  
18 the positions that we have taken and this Court has taken. We  
19 would just ask that Vale, as they have done in the past and  
20 promised to do, continue to keep us up to date and to serve us  
21 when things are served simultaneously in their Hague  
22 proceeding, to notify us when depositions are scheduled, and to  
23 provide us documents quickly when they are provided by the  
24 investigator.

25 THE COURT: Any problem with that?

1 MR. LIMAN: Your Honor, we have already provided them  
2 everything that has been produced.

3 MR. LYTTLE: Your Honor, we don't have the second  
4 witness statement from Mr. Kelly.

5 MR. LIMAN: I will look into it. That's the first I  
6 have heard about it.

7 THE COURT: Get it to them quickly.

8 Roman numeral III, Rio's application, discovery with  
9 respect to Vale, the Nardello report. I'm not prepared to rule  
10 on it at this time. The auditors' material, which is item (b)  
11 -- I'm now on page 11 -- Vale's agreed to request documents  
12 from E&Y. It seems that's the end of it.

13 MR. LIMAN: Your Honor, I can update you on that. We  
14 have written to the various E&Y affiliates. We haven't  
15 received responses yet. When we do receive responses, we will  
16 let Rio Tinto know, and let them know the position with respect  
17 to control. I don't know what position they will take. We  
18 haven't stipulated as to anything.

19 MR. LYTTLE: Your Honor, just as we were asked and  
20 ordered to provide our communications with the investigators,  
21 we would ask to see their communications with Ernst & Young to  
22 make sure they're asking for the right materials, as well as to  
23 see any responses.

24 THE COURT: Any problem with that, Mr. Liman?

25 MR. LIMAN: None whatsoever.

1 THE COURT: Okay, next. Vale's objections to Rio  
2 Tinto's second interrogatories and third document requests.  
3 Except where Vale has agreed to produce certain documents, the  
4 objections are all sustained.

5 If you desperately need to make argument on this, on  
6 Rio Tinto's side, I will listen, but the odds of me changing my  
7 mind are slim. Discovery has to end at some point.

8 MS. McCAFFREY: Your Honor, to be clear, it's your  
9 ruling with respect to the interrogatories or also --

10 THE COURT: Both. Interrogatories and document  
11 requests.

12 MS. McCAFFREY: Then, your Honor, I believe we need to  
13 make a record.

14 THE COURT: Make a record.

15 MS. McCAFFREY: With respect to interrogatory  
16 number 12, which calls for Vale to identify every person who  
17 has knowledge and/or that may possess information regarding  
18 Vale's response to Rio Tinto's November 2008 briefing, that  
19 briefing was a critical briefing related to notification to  
20 Vale of BSGR's --

21 THE COURT: Let me interrupt you to help on one thing.  
22 We are supposedly -- "we," meaning, you -- about to start  
23 taking depositions. The fact that I'm not making them answer  
24 interrogatories asking for every person, which is clearly  
25 overbroad, you are free to depose whoever the designee is,

1 whether it is a name or a 30(b)(6), on some of these issues and  
2 ask them who else may be knowledgeable and what they know.  
3 That's a much more appropriate and convenient, under our local  
4 rules, way of getting this information at this stage in the  
5 case than doing it this way.

6 MS. McCAFFREY: To that, your Honor, I recognize that,  
7 I understand that. I think the point there is that we are on a  
8 very expedited discovery schedule. The deposition schedule is  
9 fast.

10 THE COURT: No, you are not. If you hadn't taken  
11 three times longer than you should have with all the  
12 documents -- and you're still fighting over that -- things  
13 would have moved much more quickly. So, you know, get the  
14 information through depositions. If that means somebody else  
15 will have to be deposed, we will figure out a way to get that  
16 to happen.

17 Anything else you want to make a record on?

18 MS. McCAFFREY: I do, your Honor.

19 With the document requests in particular, I am now on  
20 request number 78, which requests documents concerning one of  
21 Vale's agents. In particular, I want to notify you in the  
22 course of going through the Vale production, we have found  
23 evidence that supports our belief that Mr. Keira was acting on  
24 behalf of Vale as an agent; more specifically, in 2008, which  
25 is a critical time period in this case, was liaising as Vale's

1 agent with the Guinean president and other officials within the  
2 Minister of Mines, and that was in connection with trying to  
3 acquire rights at Simandou.

4 We believe that this is particularly relevant given  
5 the allegations in this case.

6 THE COURT: Objection sustained.

7 MS. McCAFFREY: Request number 79 regarding Vale's  
8 discussions with third parties, again we believe this is highly  
9 relevant in terms of, in particular, it goes to use and  
10 dissemination of Rio Tinto's information; in particular, the  
11 extent to which Vale then used that information and put it off  
12 as its own in order to try to entice another joint venture  
13 partner to join its efforts at Simandou. We believe it will  
14 also shed light in terms of any information Vale may have  
15 provided with respect to questions or issues raised by the  
16 Guinean government in connection with the legality of their  
17 rights to Simandou.

18 Finally, your Honor, this frankly is very similar in  
19 scope to the same request that Vale served on Rio Tinto with  
20 respect to Shan Alto (phonetic) and BHP, which we have already  
21 produced documents in response to.

22 THE COURT: My ruling stands.

23 If you're really going to take objections to Judge  
24 Berman, which is probably a very good way to get him to rule on  
25 the motion to dismiss, to let him see firsthand what I'm going

1 through with all of you, make your record. But you submitted  
2 letters in advance. I have read them. I have read each side's  
3 views on this. This is not the first round of document  
4 production. If you get these materials 30 days from now,  
5 you're never going to take depositions. It is time to move  
6 this case to its final stage.

7 MS. McCAFFREY: Understood, your Honor.

8 I guess a question for you: May our submissions in  
9 the joint letter stand as our record?

10 THE COURT: Absolutely.

11 MS. McCAFFREY: Otherwise, I won't take the Court's  
12 time.

13 THE COURT: Next. This jumps us all the way over to  
14 page 20. Let me first deal with footnote 18. Is Trojan Horse  
15 a code name for the BSGR deal, Mr. Liman?

16 MR. KARLAN: The short answer, your Honor, is that as  
17 they know because we produced documents so indicating, it is  
18 used sometimes seemingly interchangeably with that deal,  
19 although it does not appear until about the same time as the  
20 transaction itself, which is April 2010. It also appears later  
21 in contexts which suggests to me, as the reader, that it is  
22 used more generally to refer to Simandou. I don't think it is  
23 necessarily synonymous with the deal.

24 MS. McCAFFREY: Your Honor, based on our review of the  
25 documents, it does not appear that it was used simultaneously

1 with Simandou from the documents that we have seen. It has  
2 also raised concerns on our part that the deal was not closed  
3 on April 30th and that the documents, the limited amount that  
4 we have seen on Trojan Horse, do indicate it is very specific  
5 to the BSGR deal.

6 THE COURT: Since you're doing a mixed key word and  
7 predictive coding system here, on anything already not  
8 produced, if you had to run the term Trojan Horse, how much  
9 material -- I don't know which of you is going to answer  
10 this -- how much material would it turn up so that we are sure  
11 that this is covered?

12 MR. REENTS: Your Honor, I don't know the answer to  
13 that. I do know that we've produced a number of documents that  
14 contain the term.

15 THE COURT: "A number" is not all.

16 MR. REENTS: It is conceivable there are other  
17 documents, although we did go through the process as specified  
18 by the protocol wherein we sampled documents that were excluded  
19 by the search terms, and we didn't find any responsive  
20 documents --

21 THE COURT: Of the excluded documents, how many refer  
22 to Trojan Horse?

23 MR. REENTS: I can tell you that from the sample that  
24 we reviewed there were zero responsive documents.

25 THE COURT: This is easy enough. It doesn't take

1 fancy predictive coding, tar. Run a key word search on the  
2 documents that never made it into the predictive coding system  
3 and unless there are a huge number -- and you're, I think,  
4 suggesting there wouldn't be because of the sampling -- but  
5 anything you find with Trojan Horse produce. That's the  
6 Court's ruling.

7 MS. McCAFFREY: Your Honor, Trojan horse was never a  
8 search term that was used. Thank you in terms of any of the  
9 documents that were excluded, but can it also be run against  
10 the document universe of 800,000, the winnowed-down universe,  
11 to make sure that they're getting a full set?

12 MR. REENTS: Your Honor, we have a process in place  
13 for deciding whether those documents are responsive that  
14 involve the use of predictive coding, training sets --

15 THE COURT: Either throw this over to Ms. Grossman and  
16 you can pay 800 and whatever it was, 850 or 875 an hour, or I  
17 can tell you that regardless of whether we are mucking up the  
18 system more than it already is by mixing and matching, it would  
19 seem to me that unless you're telling me there are a huge  
20 number of non-produced documents that have the term Trojan  
21 Horse in it that rather than have 12 lawyers sitting here  
22 billing \$50,000 an hour, whatever your collective billing rate  
23 is, that you do a key word search, throw out everything not  
24 produced for Trojan horse. If you come back to me and say that  
25 turns up a million documents or whatever number is the number



1 that you think is so excessive that it has to be winnowed down  
2 in some other way, just produce it.

3 That's the Court's ruling, period.

4 Now, I guess my question on the rest --

5 MR. REENTS: Your Honor, just one point on that. I  
6 didn't understand your ruling to be that we could not review  
7 for relevance --

8 THE COURT: Review for relevance and privilege, but  
9 you're probably going to get questioned. If Trojan Horse,  
10 somebody is also talking about their Greek mythology days,  
11 etc., fine. If it is a close call, you're going to work with  
12 the folks across the aisle from you so I don't have to deal  
13 with it.

14 MS. McCAFFREY: Your Honor, can we get an order that  
15 they disclose the number of documents that are returned by the  
16 search?

17 THE COURT: Yes. So ordered.

18 All right. Now, as to Vale's document production and  
19 the gaps that you see, you know, this seems to be a possible  
20 crossover between scope definitions, which is in front of me,  
21 and tar protocols and the like, which is in front of the  
22 special master, Ms. Grossman.

23 What do you all suggest?

24 MR. LYLE: Your Honor, with respect to the issues we  
25 have raised in correspondence, we think these fit within your

1 purview. There are major holes in the production. In addition  
2 to the examples we have listed here --

3 THE COURT: Let me just look at what seems to be your  
4 conclusion paragraph, and you want, as a first step, the hit  
5 report for the search terms that ran to narrow the document  
6 universe?

7 MR. LYLE: Yes, your Honor, that's what we're asking  
8 for.

9 THE COURT: Mr. Reents, any problem with that? That's  
10 just numbers, right?

11 MR. REENTS: Yeah, we do. They note this is just a  
12 first step, presumably with a greater number of steps. But the  
13 principle, your Honor, is that we agreed to a protocol for the  
14 exchange of documents and an incredibly amount of transparency  
15 into our review process. We have produced to them almost 8,000  
16 documents during the predictive coding training process that  
17 they not only looked at but sat down with us and coded and had  
18 an attempt to object to, and they haven't brought a single  
19 document to your Honor's attention. The reason is because we  
20 have reached agreement on all those documents. We have a very  
21 good understanding about what the scope of these document  
22 requests are. To allow them to come at the very end of the  
23 process and suggest additional steps that we need to go through  
24 in order to provide even more transparency than the protocol  
25 allows would not be fair to Vale. I worry that it invites

1 further delay and further unnecessary burden --

2 THE COURT: My concern is this: They have a list of  
3 about a dozen areas that they think you haven't produced enough  
4 information about. Now, you know, there are at least two, if  
5 not more, possibilities. One is there are no documents about  
6 it because their view of the case and what happened is  
7 erroneous and there is no conspiracy and no bad acts, etc.,  
8 etc. The other possibility, of course, is that through defects  
9 in the document production process, whether in terms of how you  
10 viewed the scope or how you did the prescreening leading to the  
11 tar process, etc., that things got left out.

12 How do I deal with this?

13 MR. REENTS: I have a suggestion. First, in terms of  
14 the specific issues that they raise, there are a couple of  
15 other possibilities. One is that we have, in fact, produced  
16 quite a number of documents in response to many of these  
17 issues. Second possibility, which is also true for a couple of  
18 these, is that these are not requests that are validly before  
19 us. They withdrew them or your Honor limited them.

20 THE COURT: With all due respect --

21 MR. REENTS: But --

22 THE COURT: -- that was a discussion that I would have  
23 liked to see you all have had before today. If what you're  
24 suggesting is that we once again defer or that you all, if you  
25 think you can do it here, after we finish everything else in

1 this letter, go to the jury room and try to make some progress.  
2 But it's difficult for me. You agreed to a protocol. I told  
3 you at the time I had some questions about it, but you agreed  
4 to changes. I approved it. You're both going to have to live  
5 with that. However, I have not reread the protocol in  
6 preparation for today, but I am relatively confident that it  
7 did not say that at the end of the day -- I'm not sure if we're  
8 at the end of the day or just at sunset as opposed to  
9 midnight -- that there could be a challenge if the document  
10 production for whatever reason was insufficient.

11 MR. REENTS: Your Honor, with respect to that, two  
12 points: One is, of course, sufficiency is not merely measured  
13 by the number of documents you produce. We're obligated to  
14 undertake a reasonable search. We have provided extensive  
15 disclosures to them and transparency about the nature of that  
16 search; and moreover -- this is sort of the punch line-- there  
17 is a way to validate the completeness of our production, which  
18 is that we produced to them at the very beginning of this  
19 process back in April a control set randomly selected from our  
20 entire document universe, and that gives them a very good idea,  
21 4,000 documents of what's in our document universe. Not only  
22 that, but through statistical extrapolation, you can calculate  
23 how many responsive documents you should expect to find in that  
24 document universe and how many documents you should expect that  
25 we would produce. It turns out that those numbers line up very

1 closely with what we have in fact produced. There is a  
2 methodological point here. I'm not expecting your Honor that  
3 we go into the details of that. But we set up a  
4 meet-and-confer with them later in the week. We're happy to  
5 take them through those calculations and those numbers if  
6 they're willing to do the same thing with respect to their  
7 production, and to the extent that there are concerns about  
8 statistical extrapolation or the methodology, we have  
9 Ms. Grossman, and we can raise those issues before her.

10 MR. LYLE: Your Honor, it is interesting that Vale has  
11 taken this position. With respect to the documents that they  
12 used for training the system, we had a review of those  
13 documents. Two hundred of those documents have not been  
14 produced in their production. That is 25 percent of the  
15 documents that they used to train their system hasn't been  
16 produced in production. The documents we saw, reviewed, 200 of  
17 them are already missing. That is one hole, your Honor. They  
18 agreed that those documents were responsive in that process,  
19 and we don't have those documents.

20 The second point, your Honor, is with respect to the  
21 process that we utilized, what we're looking for here, going  
22 forward in terms of suggestion, is we've asked simply that as a  
23 stepping off point that they give us the search term hit report  
24 for the search terms Vale ran to narrow its document universe,  
25 so that we can engage in a meaningful --

1 THE COURT: Let me back up half a step. Do you know  
2 the search terms that were used and you just need the hits, or  
3 you don't even know the search terms?

4 MS. McCAFFREY: Your Honor, if I may be heard. We do  
5 know the search terms. We would like to see the hits. We  
6 believe this would be a first step.

7 THE COURT: Okay. Then, I'm going to ask you --

8 MR. REENTS: Your Honor --

9 THE COURT: Hang on. Breathe in between a sentence  
10 without losing the floor.

11 The question, I guess, is: You knew the search terms,  
12 and the time to object to all of that has not only passed but  
13 we had a conference on it, subject to the final review stage.  
14 What is the hit report going to do to add to that, and to take  
15 Mr. Reents' fear of slippery slopes, which is not unjustified,  
16 let's say that a term that they used to screen out documents  
17 had a very high hit number or a very low number, where do we go  
18 from there unless, of course, they used as a screen-out as  
19 opposed a screen-in a term that is clearly relevant and you've  
20 had the terms? Where would we go with this?

21 MR. LYLE: It will give us a sense, your Honor, it's  
22 another metric that will allow us to assess the responsiveness  
23 of what they have given to us, because they have only produced  
24 17,000 documents out of a universe that they describe as having  
25 1.3 terabytes --

1 THE COURT: I have all that as to how big the universe  
2 was.

3 MR. LYLE: If we are able to look at how responsive  
4 they are, we can also look at what they have given us, and we  
5 can see how large these gaps truly are.

6 THE COURT: You have convinced me of two things.

7 MR. LYLE: Your Honor, I wanted to address the other  
8 point that you made before you make a determination.

9 THE COURT: Go ahead.

10 MR. LYLE: The other possibility that you articulated  
11 was that there are documents that Vale has taken the position,  
12 they're saying our complaints about their production are that  
13 there is nothing in the production that supports our case. We  
14 have, your Honor, a couple of examples that I can hand up to  
15 you that show that we've seen some glimpses into some documents  
16 that are responsive and supportive of our allegations. For  
17 example, our amended complaint is full of allegations about the  
18 use of Liberia to transport iron ore out of Guinea through  
19 Liberia, and there is a document that they produced, we only  
20 have the document, a draft mineral development agreement that  
21 refers to the use of Liberia for the exportation of iron ore  
22 from Guinea, and it is an agreement involving BSGR and Vale  
23 that's dated four months after the deal, the negotiations  
24 between Rio Tinto and Vale Crater. That's exactly what we're  
25 alleging in our case. What we don't have are emails related to

1 this document beforehand, correspondence related to that  
2 document. We don't have prior versions of this. So there are  
3 ample examples.

4 THE COURT: Okay. On this one, you are going to take  
5 a twofold approach: One, you're going to sit down and have  
6 this sort of specific discussion, which at least based on both  
7 the letter and at least what Mr. Reents is saying -- I'm not  
8 sure, Mr. Lyle, if you have shared those specifics with him --  
9 but it is clear to me that you all need to sit down and further  
10 discuss this. To the extent that you want the hit report, I am  
11 not ordering it, and I'm not denying it. To the extent that  
12 that is part, albeit -- well, it is an approach leading to your  
13 tar process, and therefore, in the first instance, it is for  
14 you all to sit down and see if Ms. Grossman can either help you  
15 compromise it, or if not, she will rule on whatever you ask her  
16 to rule on, subject to my review of her rulings and Judge  
17 Berman reviewing my rulings. It seems to me that, on the one  
18 hand, principle number six, the producing part is in the best  
19 position to determine how and what to produce, but that does  
20 not give them free range not to produce responsive documents,  
21 etc. It may be that using the various documents where you say  
22 you have seen a glimpse, Mr. Lyle, but not anything else that  
23 they can focus on that and find more material as a supplement  
24 to the key word/tar production methodology.

25 MR. REENTS: Your Honor, on that, I would just note



1 that, in fact, the parties already did agree to a supplemental  
2 training process. If these documents that they contend are so  
3 case breaking, they are entitled to include those in a  
4 supplemental seed set that we will use for further training on  
5 the predictive coding universe.

6 THE COURT: You have heard my ruling. You all need to  
7 cooperate with each other, and that will save you money. It is  
8 the usual thing about do you want the nine strangers in the  
9 jury box determining your fate or do you want to settle a case  
10 and work it out. Similarly, you can work as much of this out  
11 as possible or trigger an application to Ms. Grossman, and we  
12 will go from there. If it is a true scope issue, meaning you  
13 define X on the plaintiff's side as in the case and defendant's  
14 have defined it out of the document discovery, that's an issue  
15 that I will be ruling on, but this does not seem to be a scope  
16 issue as such. That's the Court's ruling.

17 MR. LYLE: If I understand your Honor, if after we  
18 have met and conferred we continue to believe that this is a  
19 scope issue, we should pursue it with your Honor rather than --

20 THE COURT: Only in the sense of if you say -- and I  
21 will use one of your bullet points -- that drill location from  
22 blocks one and two and how those locations were chosen is  
23 relevant to the lawsuit and not outside of discovery under the  
24 operational exception to production, and they say, no, no, no,  
25 that is purely operational, that comes to me. If the issue is,

1 we agree, we look for this sort of information but this is all  
2 we found and Vale will say, take a look at document with Bates  
3 stamp -- or its electronic equivalent -- such-and-such, we  
4 think you've got some there, that's all we've found, then it's  
5 a process of how you're going to find more or why more wasn't  
6 found, that goes to Ms. Grossman.

7 Everyone clear?

8 MS. McCAFFREY: One clarification point: I believe  
9 Mr. Reents had said that the parties were in full agreement in  
10 terms of the predictive training coding. That's not true.

11 THE COURT: I don't think you're in full agreement  
12 with them on anything.

13 MS. McCAFFREY: That's a fair point.

14 There are still some outstanding agreements on Vale's  
15 training set. I just want a clarification. It is with respect  
16 to certain coding --

17 THE COURT: Obviously, anything that is tar related  
18 goes to Ms. Grossman.

19 MS. McCAFFREY: Thank you for the clarification.

20 THE COURT: Roman numeral IV, page 23, discovery from  
21 BSGR and Steinmetz, frankly, I have the feeling that BSGR and  
22 Steinmetz are going particularly slowly. But proceed.

23 MR. FORST: Your Honor, I know you have read our  
24 letter closely and detailed the issues with BSGR's production  
25 here, but truth be told, a few months ago we had assurances

1 from Mr. Filardo and BSGR that through the Hague Convention,  
2 they would make a full production in connection with the scope  
3 of our request. What we have gotten in return is a number of  
4 documents just on its face that look absurdly low relative to  
5 the rest of the defendants. You can do some quick metrics  
6 there and compare emails that are being produced from Vale  
7 compared to what is coming from BSGR. There are hundreds and  
8 hundreds missing. We have specific presentations that were  
9 authored by BSGR, and there is not a single document draft  
10 presentation discussion about it, an email about it, a  
11 follow-up, even that presentation itself hasn't come. As you  
12 go through the list and you look at this production, there is  
13 just gap and gap and gap.

14 What we have done and all we have suggested is say,  
15 Mr. Filardo, let's get some transparency into the process.  
16 What did you do, what custodians, what search terms. Maybe we  
17 can work together to figure this out. And yet all we have  
18 gotten in return is, in fact, Mr. Filardo has apparently  
19 referred us to his colleagues in London, and they said, no  
20 dice, you don't get it. I'm sorry. You're not entitled to  
21 look into that stuff.

22 Again, we're willing to be cooperative about it, but  
23 if you look at the production on its face, the obvious holes,  
24 we want to see a little bit more.

25 THE COURT: Mr. Filardo.

1 MR. FILARDO: A lot of what was stated to the Court is  
2 just simply inaccurate. First of all, to begin with, these are  
3 requests that are propounded pursuant to the Hague, letters of  
4 request that were carefully negotiated by the parties. They  
5 needed to be narrow sufficiently to pass muster, and they were,  
6 and the parties agreed to. What Rio is looking for now are  
7 broad-based responses that would not be responsive to these  
8 letters of request and requests made of them. They're  
9 comparing them to Vale's responses under federal rules,  
10 broad-based federal rules --

11 THE COURT: Let me ask you this: If for no other  
12 reason than to satisfy Rio and possibly Vale, who is sitting at  
13 the same table as you but is not necessarily always your  
14 friend, is there any reason why you shouldn't identify, for  
15 example, which custodian's data was searched?

16 MR. FILARDO: Your Honor, we have not refused to do  
17 that, nor have I punted it over to my London colleagues, even  
18 though my London colleagues are the attorneys who reviewed  
19 these documents, and in an effort to comply with the UK High  
20 Court order. They take that responsibility very, very  
21 seriously. We have not. We put in a written response by the  
22 people, the attorneys with personal knowledge about the review  
23 and production and actually offered to have a meet-and-confer  
24 if Rio wanted to have it after they read our letter. I think  
25 we have resolved a number of the issues that they have raised

1 in their letter, some that I feel confident telling your Honor  
2 about, but I think they're in our actual part of the joint  
3 letter.

4 But do I think there is an impediment to actually  
5 providing who the custodians were? No, I do not think that.  
6 I'm not sure that is required under the rules, but in the  
7 context of our meet-and-confer process, I don't think there  
8 will be an objection to that.

9 THE COURT: Take a look at page 24, the last Rio Tinto  
10 paragraph before your position statement. Is there anything --  
11 putting aside (i), which is substantive production, but as to  
12 little (ii), the information they want, custodians, search  
13 terms, date restrictions used to cull, size of the collection  
14 before culling, and a search term hit report.

15 MR. FILARDO: I think to the extent that we have that  
16 information, we can provide it. The reason I say that is  
17 because I know there were certain -- I've been told, this is  
18 anecdotal, your Honor -- that certain search terms were run and  
19 there may be hit reports, but then there may have been  
20 additional follow-up searches that were done that they may not  
21 have hit reports for, and I'm not exactly clear how that was --

22 THE COURT: The Court is ordering you on consent to  
23 produce, to the extent available, the information called for by  
24 (ii) and to meet and confer with the Rio Tinto folks and anyone  
25 else who has an interest and, if necessary, with an open phone

1 line or Skype to London and try to resolve that. Anything that  
2 is left after that, you can either go back to my counterpart  
3 across the pond, or I will deal with it if it is within my  
4 current view of my agreement with you on sending it to London  
5 instead of doing it as federal rules discovery. Obviously, if  
6 and when Judge Berman rules on the BSGR/Steinmetz motion, if  
7 you're still in the case, and Rio Tinto is not satisfied with  
8 what it has gotten from you because of restrictions under the  
9 Hague, you might have to do something --

10 MR. LIMAN: Your Honor, as you have anticipated, we  
11 would like to be part of that meet-and-confer process and like  
12 to have the same rights that your Honor granted Rio Tinto.

13 THE COURT: Okay. If necessary, you'll come back to  
14 me.

15 On VBG, I know your client is not existing and its  
16 poverty stricken and all of that, but it seems to me that it's  
17 time for the documents from Guinea to make their way over here.

18 MR. TREMONTE: Your Honor, I think on prior occasions  
19 you have heard from Mr. Auerbach.

20 With respect to the two categories of documents that I  
21 understand are located in Guinea, there is the hard copy  
22 documents that are in some form of storage and also the  
23 documents that were seized by the Guinean government, I know  
24 that Mr. Auerbach has been making efforts to determine whether  
25 or not we can gain access to those documents. We do not

1 currently have access. I last spoke to him on Friday. I know  
2 that those efforts have not been successful, and I don't know  
3 if they will be, but that's the status of what I know.

4 THE COURT: Whatever the government has, there's  
5 basically only begging. What's in storage, it may cost money,  
6 but unless you're telling me that VBG does not have the right  
7 to get those documents out of storage, if it is only a question  
8 of the storage company has a lien on it and somebody has got to  
9 pay, your client has got the choice of somehow coming up with  
10 the money and paying and producing the relevant documents from  
11 that or potentially being defaulted for discovery violations  
12 and if you can't pay the cost of the storage company, it  
13 probably doesn't matter whether a default judgment is entered  
14 against you if there are no assets. But I have been hearing  
15 this, we're working on it, we're working on it for much too  
16 long.

17 What is the reason that you can't get the files that  
18 are in storage?

19 MR. TREMONTE: Your Honor, I am at something of a  
20 disadvantage. I don't know the precise details of the  
21 back-and-forth. I think it may be somewhat more complicated  
22 than simply a matter of we owe somebody money that hasn't been  
23 paid. I would request an opportunity to confer with  
24 Mr. Auerbach and then confer, in turn, with Rio Tinto by the  
25 end of the week on this issue.

1 THE COURT: So ordered, but at some point, the  
2 kindness that everybody has been showing to Mr. Auerbach and  
3 VBG is coming to an end, and my patience at this stage is  
4 certainly enough excuses. I'm either going to need actual  
5 proof, an affidavit or whatever, as to what the impediment is  
6 as to the files in storage or something more than we're working  
7 on it but it is complicated.

8 MR. TREMONTE: Understood, your Honor.

9 MR. FORST: With respect to those documents, the one  
10 thing that we have requested from Mr. Auerbach and we have yet  
11 to receive -- and as you know, there's been a lot of, we're  
12 trying, we're trying -- I have specifically asked him, can you  
13 copy us on the letters or give us letters that you're sending  
14 or inform us who you are reaching out to, because we have  
15 offered, Rio Tinto can get people there and work with people.  
16 We have offered to assist in that effort, but again, we have  
17 only been met with we're trying. To the extent we're going to  
18 get an update on Friday, I would appreciate getting all the  
19 correspondence that they have and maybe some specifics so maybe  
20 we can pitch in because we want the documents.

21 THE COURT: Any problem with that?

22 MR. TREMONTE: Your Honor, again, my understanding is  
23 that Mr. Auerbach is making diligent efforts. I don't know if  
24 he has been doing that in letters or on the phone or some other  
25 form of communication. I may well have a problem with it. I



1 just don't know. If we can do the meet-and-confer --

2 THE COURT: Do the meet-and-confer. If there are  
3 letters, produce them, unless you have a very good reason,  
4 which you'll tell me by letter on Friday why you're not  
5 producing. By letter, I mean email, text, any other method of  
6 modern communication that leaves a track record beyond a phone  
7 call. We're about to go into the deposition period in  
8 September, I think, or whenever it is that Judge Berman has let  
9 the clock start running again. I think it is somewhere in  
10 September. Enough is enough.

11 MR. TREMONTE: Understood, your Honor. Thank you.

12 THE COURT: What else?

13 MR. FORST: For VBG, in addition to the documents,  
14 either hard copy or seized from the government, we have since  
15 we filed the letter earlier this week been working with VBG to  
16 identify additional custodians. All we ask here, since we're  
17 having a meet-and-confer Friday, maybe we get an order that we  
18 get that list by this Friday, so we can continue to move  
19 forward, electronic documents that VBG may have on Vale's  
20 servers from previous --

21 THE COURT: It is going to be very simple. This is  
22 taking too long, and if VBG doesn't cooperate, then I will  
23 order that whatever Vale identifies as a potential VBG email  
24 account, they're going to produce it, and they're going to lose  
25 any input on it. So, by Friday, you all better get that worked

1 out.

2 MR. LIMAN: Your Honor, with respect to the issue of  
3 the privileged documents, I've got a suggestion for your  
4 Honor --

5 THE COURT: Okay.

6 MR. LIMAN: -- if I might. The specific request we  
7 make, which is at page 5 of the letter, the third full  
8 paragraph, is with respect to the ESI protocol and the  
9 requirement that producing party -- which in this case would be  
10 Rio Tinto -- shall provide additional information sufficient to  
11 allow the receiving party to evaluate the claim of privilege  
12 over the information received. With respect to a number of the  
13 documents, until we saw the insert from Rio Tinto, which made  
14 reference to Aeneas, we had not been provided that information  
15 with respect to the communications with Aeneas. We still have  
16 not been provided that information with respect to the other  
17 documents that Mr. Lytlle referenced.

18 What we would ask for is either that in court now or  
19 by the end of this week, pursuant to an order from your Honor,  
20 we be provided that additional information so that we can  
21 evaluate it, we can confer, and if there is an issue, bring it  
22 to your Honor, if there's not, try to work it out.

23 THE COURT: Any objection to that?

24 MR. LYTTLE: We are happy to. Again, these documents  
25 are new to us. We will take a look at them and provide

1 additional information. That is not necessarily required.

2 We're happy to do it. I ask that it be reciprocal. We have  
3 yet to see a priv log from Vale.

4 THE COURT: I'm not dealing with reciprocal requests.  
5 Each request is standalone. If you want to give me, we'll take  
6 a shot at one -- because I'm still missing the plaintiff for  
7 the 3:00 conference -- you want to give me one of the redacted  
8 and unredacted, I will take a look and see if anything jumps  
9 out to me as clearly privileged --

10 MR. LIMAN: Your Honor, given the magnitude of this  
11 issue I think for both sides, frankly, for the defendants, the  
12 issue of equitable tolling is one of our main defenses, and I  
13 don't underestimate the significance of the issue --

14 THE COURT: With all due respect, Mr. Liman, if I read  
15 this and it says, you know, the lawyers at Quinn Emmanuel said  
16 X, then I have a pretty good idea that the claim of  
17 attorney-client privilege is well founded unless there was a  
18 waiver. That's similar to what I've deferred on ruling on  
19 Nardello as to whether there is a privilege there or not. If,  
20 on the other hand, there is something that is marked as  
21 attorney-client privilege that could not in a million years  
22 satisfy the standards for privilege, then I can easily look at  
23 that and give you all some advice going forward to look at the  
24 remainder of the documents. Now, if it is more complicated  
25 than that, I may or may not want briefing from you. I

1 certainly will give you the opportunity to meet and confer  
2 further, but let me see one document or two documents, one by  
3 you and one by Mr. Lytlle --

4 MR. LIMAN: Let me hand up exhibit, it is Bates RT  
5 7171.

6 THE COURT: I need the corresponding one from  
7 Mr. Lytlle.

8 MR. LIMAN: I would like to hand up 7144.

9 THE COURT: I thought your minions and his minions  
10 were putting this all together better. Talk to him without  
11 being on the record and figure this out.

12 MR. LYTTLE: If I can offer a quick proffer on who  
13 those individuals you're seeing are, it might be helpful.

14 THE COURT: Hang on.

15 MR. LYTTLE: I don't have it in front of me. I  
16 believe it is from Mr. Deschends, who is a high level member of  
17 Rio Tinto's internal security team.

18 THE COURT: Are there any lawyers on this document?

19 MR. LYTTLE: There is. Tim Lane is a Rio Tinto  
20 lawyer.

21 THE COURT: Let me put it to you this way: Under  
22 502(a), even voluntary production of this is not a waiver. I'm  
23 not reading anything here that is either legal advice or asking  
24 for legal advises as opposed to setting up a meeting. Are you  
25 really claiming that this is attorney-client privilege?

1 MR. LYTTLE: May I ask for a side bar, your Honor,  
2 just to point that concern out?

3 THE COURT: This is off the record.

4 MR. LIMAN: Your Honor, we would be prefer it be on  
5 the record and just that section redacted.

6 (Mr. Lyttle at sidebar)

7 MR. LYTTLE: It's going to be this portion, your  
8 Honor. This is Mr. Deschends asking Rio --

9 THE COURT: That's not a waiver.

10 MR. LYTTLE: Not a waiver or not privileged?

11 THE COURT: Both.

12 MR. LYTTLE: This is asking counsel to direct and  
13 assist the investigator.

14 THE COURT: Okay. But as long as it is produced on a  
15 non-waiver agreement, that doesn't mean that what advice  
16 Mr. Lane gave to the consultant is fair game.

17 MR. LYTTLE: If we produce this asking counsel for  
18 directions but don't produce the subsequent correspondence and  
19 the direction --

20 THE COURT: Unless I look at the reminder and find  
21 that there was still nothing privileged.

22 MR. LYTTLE: Okay.

23 THE COURT: All right. Step back.

24 (In open court)

25 THE COURT: Without revealing anything from the

1 redaction that would be sensitive, this is, as I think was  
2 clear from what I said on the record before, setting up a  
3 meeting.

4 Now, this is the old slippery slope fear that I  
5 thought Rule 502(a) obviated, and so the concern that  
6 Mr. Lytlle expressed to me at the sidebar was, if I give this,  
7 will that mean that Vale can then ask what legal advice was  
8 given at the subsequent meeting that was being set up, my view  
9 under 502(a) is that that is not a waiver, it is not a subject  
10 matter waiver, assuming all the other parties agree that  
11 whether I'm right or wrong on my interpretation of 502(a) you  
12 will not call it a waiver with respect to the subsequent  
13 meeting, then we can at least deal with some of these, and  
14 there may be others of these where there will be discussion of  
15 what was actually said at a meeting, and then if it is legal  
16 advice, it doesn't have to be produced, if it is not or not  
17 requesting legal advice.

18 Mr. Liman, with that, what's your position?

19 MR. LIMAN: Your Honor, we would not argue that the  
20 fact of producing that is a waiver. We're, obviously,  
21 reserving all of our rights to argue that there already has  
22 been a waiver.

23 THE COURT: Understood.

24 Anyone else on the defense team that is going to take  
25 a different position?

1           Good. Hearing nothing.

2           How many more of these are more like this document,  
3           which for the record was RT 0677144, and how many start getting  
4           into substance? Maybe if I look at one of those, I can help  
5           you more, and then after that, you can try to work this out on  
6           your own.

7           MR. LYTTLE: Under your Honor's current order and the  
8           ones they have identified in the joint letter, it is  
9           essentially various versions of that.

10          THE COURT: Good. That, hopefully, will allow you to  
11          go forward.

12          I am returning to each of you this material, and to  
13          make the reporter's life easier, Mr. Lytlle, based on what has  
14          now gone on, can that part of the transcript be public?

15          MR. LYTTLE: Yes, your Honor. I have no problem with  
16          that.

17          THE COURT: Very good.

18          MR. LYTTLE: Your Honor, can I make one correction?  
19          We only looked at the correspondence related to this particular  
20          Tim Lane chain of emails. There is the Mr. Aeneas, Mr. Toure  
21          issue. That is a very different issue that we have not --

22          THE COURT: You all said you want to do some more work  
23          on it --

24          MR. LYTTLE: I don't want to leave the impression that  
25          everything cited in their footnote would be produced. That's

1 not correct. It includes those communications.

2 THE COURT: Understood.

3 I think that concludes this letter, and all the other  
4 letters were informational of late.

5 Is there anything else we should be doing now other  
6 than setting a time for our next conference?

7 As you're all consulting, let me help you.

8 MS. McCAFFREY: Thank you, your Honor.

9 THE COURT: Folks, you have the choice of up to and  
10 including August 21 or after Labor Day.

11 MR. LIMAN: Your Honor, it has been a complicated  
12 negotiation. If your Honor has any time on August 19th, I  
13 think we will try to make that work.

14 THE COURT: All right. 2:30, to give commuters time  
15 to get here.

16 MR. LYTTLE: Thank you, your Honor.

17 THE COURT: Although with what's been happening with  
18 Amtrak tunnels lately, you're at risk.

19 August 19, 2:30, see you then.

20 Usual drill. Everybody, in whatever sharing you have  
21 been doing, is required to buy the transcript.

22 Try to keep working as much out as possible. And  
23 while I appreciate that in order to get the letters to me  
24 two days before that sometimes things are then worked out  
25 between the letter, but I am trying to be well prepared for



1 these conferences so that I'm ruling as opposed to re-listening  
2 to argument that's already in the letter, so if you're  
3 resolving things post-letter and before the conference, that's  
4 great, but try to do it before you write the letter instead of  
5 in that gap period.

6 Okay. See you on the 19th.

7 (Adjourned)